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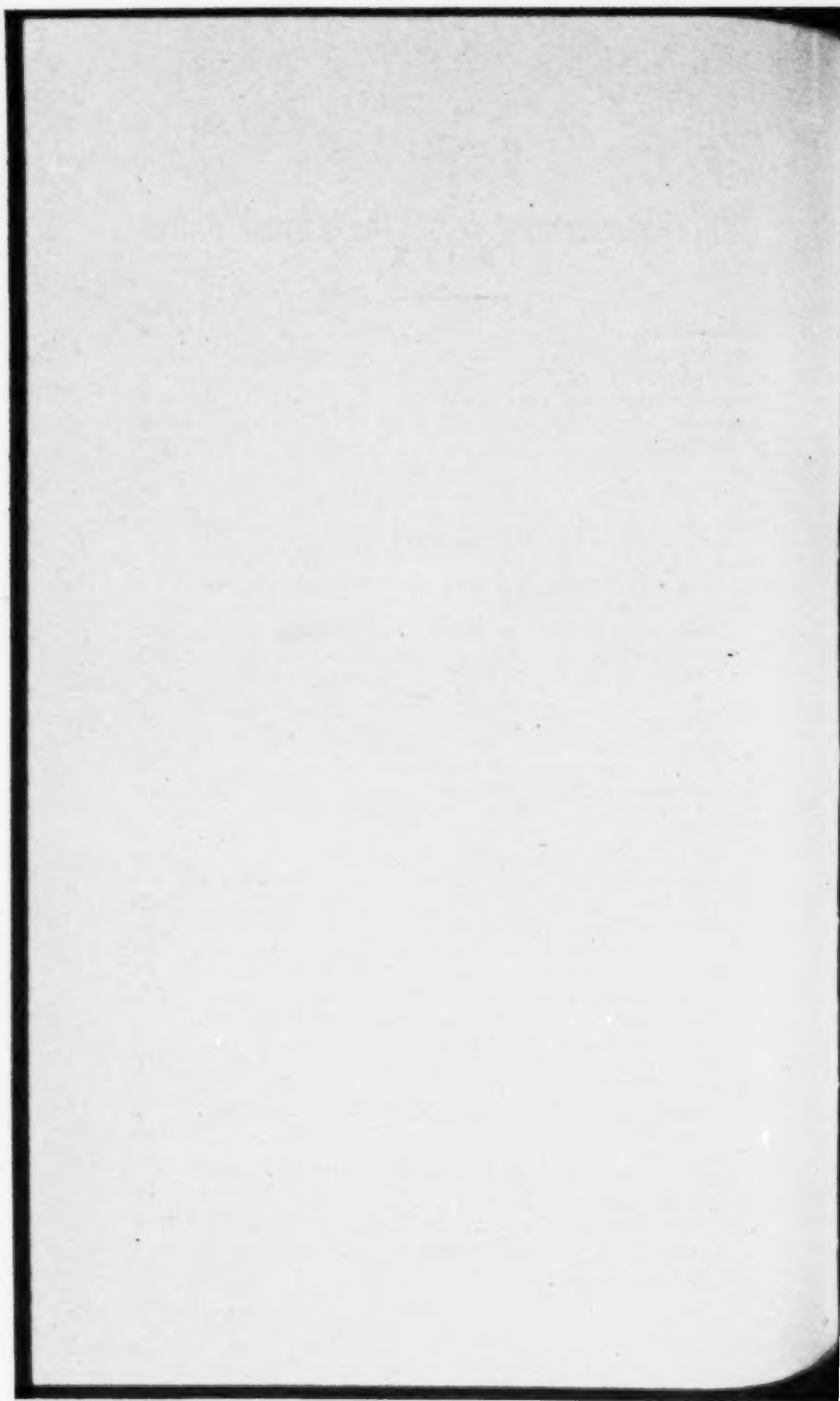
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# In the Supreme Court of the United States

OCTOBER TERM, 1947

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No. 540

ESTATE OF CHARLES M. THORP, DECEASED, GOLDIE  
D. THORP AND FIDELITY TRUST COMPANY, EXEC-  
UTORS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE  
THIRD CIRCUIT

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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## OPINIONS BELOW

The opinion of the Tax Court of the United States (R. 22-28)<sup>1</sup> is reported in 7 T. C. 921. The opinion of the Circuit Court of Appeals (R. 36-42) is not yet officially reported.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 2, 1947. (R. 43.) The

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<sup>1</sup> The record references are to the Petitioners' Appendix and Proceedings in the United States Circuit Court of Appeals for the Third Circuit unless otherwise indicated. A duplicate certified copy of the Transcript of Record has been filed with the Clerk of this Court.

petition for a writ of certiorari was filed on January 19, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTIONS PRESENTED

1. Whether the remainder interests created by decedent in 1918 under an *inter vivos* trust should be included in his gross estate under Section 811 (d) (2) of the Internal Revenue Code as being subject to change in enjoyment through the exercise of a power in conjunction with other persons to alter, amend or revoke. This depends upon (a) whether the power to terminate the trust was a power to alter, amend or revoke, and (b) whether the decedent's children had substantial adverse interests in the remainder.

2. Whether the application of Section 811 (d) (2) of the Internal Revenue Code to the circumstances of this case constitutes a violation of the due process clause of the Fifth Amendment to the Constitution.

#### STATUTE AND REGULATIONS INVOLVED

The statute and Regulations involved will be found in the Appendix, *infra*, pp. 13-16.

#### STATEMENT

The facts, which were stipulated (R. 14-21) and adopted as stipulated (R. 22) were summarized by the Tax Court substantially as follows (R. 22-24):

Petitioners are the duly qualified executors of the estate of Charles M. Thorp, deceased, a resident of Pittsburgh, Pennsylvania, who died testate on December 14, 1942. The Federal estate tax return was filed with the Collector of Internal Revenue for the Twenty-Third Pennsylvania District at Pittsburgh, Pennsylvania. (R. 22-23.)

On September 27, 1918, the decedent executed a trust agreement in which his wife, Jessie B. Thorp, was named trustee and life beneficiary of all the income. The material provisions of the trust agreement are contained in paragraphs "5" and "6," reading as follows (R. 23-24):

5. After the death of Jessie B. Thorp, said income shall be paid to our six children, Margaret T. Stewart, George B. Thorp, Evelyn L. Thorp, Charles M. Thorp, Jr., Jessie M. Thorp, and Sara Eleanore Thorp, in equal shares, during their respective lives. Unless sooner terminated as hereinafter set forth the trust shall continue until the death of the last survivor of said six children. Upon the death of each child during the continuance of the trust the income previously paid to him or her shall thereafter be paid to his or her children, if any, and if there be none then to my surviving children and grandchildren per stirpes. Upon the death of the last surviving one of my said six children the trust shall cease absolutely, and all property held in trust shall be assigned, transferred and delivered to my grandchildren

then living and the children then living of any grandchildren then dead, per stirpes, absolutely free and clear of all trusts and conditions.

6. The trust may, however, be wholly terminated at any time, or in part from time to time, in the following manner. If all the beneficiaries hereinabove named, that is, my wife and my six children, or said children alone after my wife's death, or the survivors of them, shall request a termination in writing directed to the trustees and to me, and I shall in writing delivered [sic] to the trustees consent thereto, the trust shall, upon delivery of such request and consent to the trustees, be terminated either wholly or in part, or as to the interest in whole or in part of any of said beneficiaries, in accordance with such request and consent, and the trust property shall be released in whole or in part accordingly, and the portion so released shall be assigned, transferred and conveyed to the beneficiary or beneficiaries designated in said written request to be his or her absolute property, free and clear of all trusts and conditions; provided, however, that if such termination is made before the death of my wife, the property released shall be equally divided between her and the children, that is, one-half to her and one-half to the children or the child whose portion is released. If after her death, the property released shall go to the children or the child whose portion is released.

The instrument contained no other power to alter, amend or revoke such agreement. (R. 24.)

The decedent's wife, Jessie B. Thorp, and one of the children named as a life beneficiary under the trust agreement, predeceased him. During the period from the creation of the trust to the death of the decedent the beneficiaries did not request a termination as to all or any part of the trust. At decedent's death the fair market value of the trust corpus was \$285,527 and the value of the remainder interests after the lives of the surviving five children who were life tenants was \$129,865.67. (R. 24.)

The Commissioner included in the decedent's gross estate the value of the trust remainders pursuant to the provisions of Section 811 (d) (2) of the Internal Revenue Code. (R. 24.) The Tax Court upheld the determination of the Commissioner, and upon appeal to the Circuit Court of Appeals the decision of the Tax Court was affirmed.

#### ARGUMENT

1. The decision of the court below applying Section 811 (d) (2) of the Internal Revenue Code (Appendix, *infra*, pp. 13-14) to the transfer in trust in this case is correct. The statute provides in part that the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, to the extent of any interest therein of which the decedent has at any time made a transfer, by trust,

where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend or revoke. In this case the enjoyment of the remainder interests (the gift over to the decedent's grandchildren) was subject at the date of decedent's death to change through the exercise of a power by the decedent in conjunction with his five children to *terminate*. (See Paragraph 6 of the trust instrument (R. 18-19).) This Court has held that the power to "alter, amend, or revoke" within the meaning of Section 811 (d) (2) of the Internal Revenue Code includes the power merely to terminate. *Commissioner v. Estate of Holmes*, 326 U. S. 480. Therefore the decedent retained sufficient dominion over the remainder to bring it within his gross estate under Section 811 (d) (2). See Treasury Regulations 105, Section 81.20 (Appendix, *infra*, pp. 14-16).

The decedent's failure to reserve for himself any beneficial interest or power to recapture one is not controlling. *Commissioner v. Estate of Holmes, supra*; *Porter v. Commissioner*, 288 U. S. 436; Treasury Regulations 105, Section 81.20. Nor is the fact that he could not select new beneficiaries outside those comprehended by the indenture, and was therefore limited to changing enjoyment among that group. *Union Trust Co. of Pittsburgh v. Driscoll*, 138 F. (2d) 152 (C. C. A. 3d), certiorari denied, 321 U. S. 764; *Mellon v.*



*Driscoll*, 117 F. (2d) 477 (C. C. A. 3d), certiorari denied, 313 U. S. 579; *Commissioner v. Estate of Holmes*, *supra*.

Section 81.20 (b) of Treasury Regulations 105 provides in part that if the transfer was made prior to June 2, 1924 (as it was in this case), and the power was reserved at the time of the transfer and was exercisable by the decedent in conjunction with persons *having no substantial adverse interest* in the transferred property, the interest in the property transferred in trust shall be included in the gross estate. Since the decedent's children would have been entitled to a fee interest in the trust property had it been terminated, instead of an original gift of mere life estates, they had no substantial adverse interest in the remainder. See *Lit v. Commissioner*, 28 B. T. A. 853, affirmed, 72 F. (2d) 551 (C. C. A. 3d).

The petitioners argue that inasmuch as the decedent's children never submitted a written request to the trustees to terminate the trust, the decedent's privilege of consenting or not consenting to a termination of the trust never came into existence (Br. 26-28), and that the decision of the court below is in conflict with the decisions in *Commissioner v. Flanders*, 111 F. (2d) 117 (C. C. A. 2d), and *Tait v. Safe Deposit & Trust Co. of Baltimore*, 74 F. (2d) 851 (C. C. A. 4th). The petitioners' argument presupposes that if the suggestion to terminate originated with the decedent instead of his children, a court would have

refused to decree a termination. As the court below said in its opinion (R. 39), such a holding would be to sanction "elusive and subtle casuistries." In the *Flanders* case the power to sell the property depended upon whether an emergency arose, and in the *Safe Deposit & Trust Co. of Baltimore* case the right to alter or amend was contingent upon the prior death of the settlor's wife. Those cases differ materially from the present case.

The petitioners suggest there might be some adverse interest in the children upon the termination of the trust before the last child died, because the survivors would receive an expanded share of income if any child or children died childless. (Br. 32-33.) The record before the Tax Court did not show the existence or the possibility of grandchildren. (R. 27.) The court below correctly decided that the possibility of such expansion of the interests of the children did not compel the conclusion that their interests were "substantially adverse." (R. 40.)

The petitioners argue that the decision of the court below is in conflict with the decisions in *Commissioner v. Kaplan*, 102 F. (2d) 329 (C. C. A. 1st); *Bryant v. Commissioner*, 104 F. (2d) 1011 (C. C. A. 2d), affirmed by this Court, 309 U. S. 106; *Mackay v. Commissioner*, 94 F. (2d) 558 (C. C. A. 2d); and *Commissioner v. Hallock*, 102 F. (2d) 1 (C. C. A. 6th), reversed by this Court, 309 U. S. 106, with respect to the interests

of the beneficiaries being substantially adverse. (Br. 21-25.) The theory of each of those cases apparently was that it was against the interest of the beneficiary required to join in the amendment or revocation of the trust to consent to the amendment or revocation, and consequently that such beneficiary's interest was adverse. The distinction between those cases and the present case, insofar as the question of substantial adverse interest is concerned, is suggested in the rationale of later decisions of the First Circuit. Thus in *Commissioner v. Prouty*, 115 F. (2d) 331, 335 (C. C. A. 1st) (a gift tax case), it was held that a remote and speculative possibility of gain does not constitute a substantial adverse interest. In the present case, as we have pointed out, it may be that there was a possibility that if one of the children of the decedent died childless, the surviving children and grandchildren of the decedent would receive a larger share of the income during the continuance of the trust, but the likelihood of such possibility occurring is not shown by this record, and in any event, even if this possibility should be considered an interest adverse to a termination of the trust, the substantiality of this interest as a compelling motivation against termination cannot be determined without taking into account the countervailing interests of the children which would be served by termination. Cf. *Flood v. United States*, 133 F. (2d) 173, 177 (C. C. A. 1st).

2. The decision of the Tax Court, affirmed by the court below, that the application of Section 811 (d) (2) of the Internal Revenue Code to the circumstances of this case does not constitute a violation of the Fifth Amendment to the Constitution is correct. We have already shown that the decedent in conjunction with his children had the power to alter or amend the trust and that the children had no substantial adverse interest in the remainder. As long as the decedent lived, the grandchildren had no indefeasible interest in the trust property, because the interest of each grandchild was subject to termination in whole or in part with the interest so released becoming the absolute property of the decedent's children. The settlor controlled the vesting of the remainder interests; after his death, the children had no power to defeat the remainder interests of the grandchildren. The decedent's death, not the transfer *inter vivos* in 1918, was the generating source of the grandchildren's title. The transfer was incomplete as long as that reserved power existed. *Estate of Sanford v. Commissioner*, 308 U. S. 39.

Since the decedent's children, in conjunction with whom he could during his life have exercised the power to alter or amend the trust, did not have substantial adverse interests in the remainder, the trust may be considered as though the decedent alone had the power to alter or amend. This Court has decided in such a case

that the power of the decedent might be deemed a substitute for testamentary disposition, and that there was no doubt that Congress had the power to treat the decedent's death as a taxable event because it ended the possibility of any change by him and was the source of valuable assurance passing from the dead to the living. *Porter v. Commissioner*, 288 U. S. 436, and cases cited on pages 444-445.

*Helvering v. Helmholtz*, 296 U. S. 93, is substantially different on its facts because the power to alter, amend or revoke was dependent upon the consent of *all* the beneficiaries, and the law of Wisconsin where the trust was created permitted all the beneficiaries to terminate the trust. In this case it was not necessary for all the beneficiaries to consent to the termination.

*White v. Poor*, 296 U. S. 98, went off on the ground that the settlor of the trust derived her power to change the enjoyment from the action of the trustees after the creation of the trust, and not from the trust instrument itself; the settlor was an original trustee, resigned and then was reappointed by the other trustees.

In *Reinecke v. Northern Trust Co.*, 278 U. S. 339, in the five trusts that were not included in the decedent's gross estate, the interests of those persons in conjunction with whom the decedent had the power to revoke, would have been cut off if the trust had been revoked and so were substantially adverse.

## CONCLUSION

The decision of the court below, affirming the decision of the Tax Court, is correct, and there is no direct conflict with the decision of any other court. There is no substantial question of the constitutionality of the statute as applied to the facts of this case. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1948.

## APPENDIX

### Internal Revenue Code:

#### SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

\* \* \*  
(d) *Revocable Transfers—*

(1) *Transfers after June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona-fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death;

(2) *Transfers on or prior to June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person,



to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph;

\* \* \* \*

(26 U. S. C. 1940 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code:

SEC. 81.15. *Transfers during life.*—The following classes of transfers made by the decedent prior to his death, whether in trust or otherwise, if not constituting bona fide sales for an adequate and full consideration in money or money's worth, are subject to the tax: \* \* \* (5) transfers under which the enjoyment of the transferred property was subject at decedent's death to a change through the exercise, either by the decedent alone or in conjunction with another person or persons, of a power to alter, amend, revoke, or terminate, or where such a power was relinquished in contemplation of decedent's death (see sections 81.20 and 81.21).

\* \* \* \*

SEC. 81.20. *Transfers with power to change the enjoyment.*—(a) *Transfers included.*—Subsection (d) of section 811 embraces a transfer by trust or otherwise (if not amounting to a bona fide sale for an adequate and full consideration in money



or money's worth) when at the time of decedent's death the enjoyment of the transferred property, or some part thereof or interest therein, was subject to any change through a power exercisable either by the decedent alone, or by him in conjunction with some other person or persons, to alter, or amend, or revoke, or terminate. (See section 81.15.)

The addition to subdivision (d) (1) of the Revenue Act of 1926, by section 805 of the Revenue Act of 1936, of the phrase to the effect that it is not material in what capacity the power was subject to exercise by the decedent or by the other person or persons in conjunction with the decedent (which phrase is also embodied in subsection (d) (1) of section 811 of the Internal Revenue Code), is considered merely declaratory of the meaning of the subdivision prior to the addition of the phrase.

The second phrase added to this subdivision of the Revenue Act of 1926 by amendment in 1936 (also embodied in section 811 (d) (1) of the Internal Revenue Code), namely, "without regard to when or from what source the decedent acquired such power," is not considered declaratory of the meaning of the subdivision prior to the amendment in a case in which no one of the powers enumerated in the subdivision was reserved at the time of the making of the transfer, but one or more thereof were conferred subsequent thereto (whatever the source from which conferred) without any understanding, expressed or implied, had in connection with the making of the transfer that such power or powers should be later conferred.

The third change made in the subdivision by the Revenue Act of 1936 (which is also

embodied in subsection (d) (1) of section 811 of the Internal Revenue Code) consists of the addition of the words, "or terminate" following the words "to alter, amend, revoke." Such addition is considered but declaratory of the meaning of the subdivision prior to the amendment. A power to terminate capable of being so exercised as to revest in the decedent the ownership of the transferred property or an interest therein, or as otherwise to inure to his benefit or the benefit of his estate, is, to that extent, the equivalent of a power to "revoke," and when otherwise so exercisable as to effect a change in the enjoyment, is the equivalent of a power to "alter."

(b) *Taxability*.—The property or any interest therein transferred as described in subsection (a) shall be included in the gross estate if it comes within any one of the following paragraphs:

(1) If the transfer was made prior to the enactment of the Revenue Act of 1924 (4:01 p. m., eastern standard time, June 2, 1924), and the power was reserved at the time of the transfer and was exercisable by the decedent alone or in conjunction with a person or persons having no substantial adverse interest or interests in the transferred property, or if exercisable in conjunction with a person having a substantial adverse interest or with several persons some or all of whom held such an adverse interest, then to the extent of any interest or interests held by a person or persons not required to join in the exercise of the power and to the extent of any adverse interest which was not substantial.

\* \* \* \* \*